



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bangar Contractors Corp.

File: B-240071

Date: October 16, 1990

James E. Donald, Esq., for the protester.
Vasio Gianulias, Esq., Department of the Navy, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cancellation of solicitation after bid opening is proper where agency reasonably concludes that the solicitation does not include significant additional requirements and that award under the solicitation would no longer meet the government's actual needs.

DECISION

Bangar Contractors Corp., a small disadvantaged business, protests the cancellation after bid opening of invitation for bids (IFB) No. N62474-88-B-6641, issued by the Naval Weapons Station (NWS), Concord, California, for the procurement of family housing maintenance and repairs at NWS. Bangar, the low bidder, contends that no compelling reason existed for the cancellation and that, consequently, it should receive award of the contract.

We deny the protest.

The IFB, issued on August 3, 1989, requested bids for a base year and two 1-year option periods. Bidders were required to submit for each yearly period a firm, fixed lump-sum price for the labor necessary for the performance of all work identified (and not excluded from coverage) in the IFB schedule and individual prices for the labor necessary for the performance of the indefinite quantity maintenance and repair work listed on the IFB pricing pages. For the purposes of award, the low bidder was to be determined on the basis of the total of its prices for the base and option year periods. The IFB provided that during the base year the contractor was to provide maintenance and repairs on 118 family housing units. During the first option year, the contractor was to provide

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maintenance and repairs on an additional 126 units. During the second option year, the contractor was to provide maintenance and repairs on an additional 118 units for a total of 362 units. The additional 244 units represented units being constructed, which were to be completed during the base and first option years. The bid opening was delayed repeatedly due to lack of funding and staffing. Seven bids were opened on the amended bid opening date of January 10, 1990. Bangar was the low bidder.

After initiating a preaward survey on Bangar and general preaward contract review, NWS found that due to certain deficiencies in the IFB an award under the IFB would not meet the government's needs. Accordingly, the survey was suspended and bidders were asked to extend the time during which their prices would remain in effect. One of these deficiencies involved the number of housing units that would require maintenance during the base and first option years. As of bid opening, construction of all 244 additional units had been completed, and thus all 362 units required maintenance during the base and first option years instead of merely 118 and 244 units, respectively. Essentially, because of these facts, NWS concluded in a determination and findings dated May 22, 1990, that the IFB should be canceled. NWS stated that although the 244 additional units were under warranty until October 1, 1990, NWS would be unable to obtain non-warranty maintenance for them during the base year under the IFB as written. It also stated that, since any modification of a contract awarded under the IFB to include the additional 244 units in the base year would significantly affect the quantities of work required and would increase the value of the contract by more than 200 percent, such a modification would be beyond the scope of the contract and would thus be impermissible. Bidders, including Bangar, were advised that the IFB had been canceled and all bids rejected due to the omission of the 244 units from the base year requirements.

Bangar contends that the cancellation was improper since Federal Acquisition Regulation (FAR) § 14.404-1 does not provide a basis for cancellation under the present circumstances and FAR § 14.401-1(a)(3) even specifically states that increased requirements may not be used as a basis for canceling a solicitation after bids have been opened, but should be acquired through an additional procurement. Additionally, Bangar notes that the IFB precluded cancellation for the reason used because the IFB provided that additional units would be incorporated into the contract and that adjustment of the firm, fixed lump-sum price would be accomplished through negotiations. Bangar argues that the other discrepancies in the IFB that NWS alleges exist, concerning ambiguities in the work statement and schedule, are also unfounded. Since, Bangar asserts, there has been no

compelling reason presented by NWS to support the cancellation and because NWS should have known the status of the new housing units prior to bid opening, Bangar believes that the contracting officer abused his discretion in canceling and that the real reason for the cancellation may stem from racial prejudice or from prejudice against small disadvantaged business concerns. Bangar is a small disadvantaged business concern whose owners and representatives (it employs Asian-Pacific Americans) are members of a racial minority.

Finally, Bangar states that it was led to believe by statements by NWS that award would be made to Bangar and that it should prepare to start work as soon as the award was made. As a result of these statements, Bangar spent an additional 180 hours of preparation and purchased necessary equipment in order to ensure the expeditious commencement of contract work. Bangar argues that the decision to cancel should have taken into consideration the financial damage it will suffer as a consequence of these expenditures if no award is made.

Because of the potential adverse impact on the competitive bidding system of a cancellation of an IFB after bid prices have been exposed, any cancellation after bid opening must be based on a compelling reason. FAR § 14.404-1(a)(1); Bill McCann, B-234199.2; B-234856, June 13, 1989, 89-1 CPD ¶ 554. The determination as to whether such a compelling reason exists is an administrative one that we will not disturb absent a showing that it was unreasonable. Independent Gas Product Corp., B-229487, Mar. 2, 1988, 88-1 CPD ¶ 217. In this regard, we generally consider cancellation after bid opening to be appropriate when an award under the solicitation would not serve the actual minimum needs of the government. Instrument & Controls Serv. Co., B-231934, Oct. 12, 1988, 88-2 CPD ¶ 345, aff'd, Instrument & Controls Serv. Co.--Recon., B-231934.2, Nov. 4, 1988, 88-2 CPD ¶ 441.

As a preliminary matter, the regulation Bangar cites, FAR § 14.404-1(a)(3), which generally precludes an agency from canceling an IFB after bid opening due to increased requirements, applies where an agency is procuring the supply of items and not where, as here, the agency is procuring services needed to perform specified work. Bill McCann, B-234199.2; B-234856, supra. Thus, that regulation is inapplicable to this procurement. Second, we cannot agree with Bangar that the IFB section which states the government's intent to incorporate new units into the work load for this contract in lot sizes of 10 or 20 units and to negotiate an adjusted lump-sum fixed price precludes cancellation of the IFB. That clause states that "new units" will be incorporated "into the work load for this contract in lot sizes of 10 or 20 units." Here, NWS has determined that it must immediately add a total of 244 units to the work required during the base year [and

118 units to the first option year]. The clause cited by Bangar does not contemplate such a large change to the requirements set forth in the IFB. As a general rule, it is impermissible to modify a contract if the contract as modified would be materially different from, and therefore beyond the scope of, the original contract for which a competition was held. See Corbin Superior Composites, Inc., B-235019; B-235019.2, July 20, 1989, 89-2 CPD ¶ 67; JL Assocs., Inc., B-234106, Mar. 22, 1989, 89-1 CPD ¶ 295. To make such a modification to a contract awarded to Bangar under the terms of the IFB as written would be prejudicial to the other bidders on the IFB since it would be essentially a sole-source award of the new requirements to the contractor, thereby circumventing the competitive procurement statutes. Feinstein Constr., Inc., B-218317, June 6, 1985, 85-1 CPD ¶ 648.

We find the NWS decision to cancel the solicitation when it learned that its actual needs greatly exceeded its needs as set forth in the IFB to have been reasonable. The change in the government's requirements increased the number of housing units to be maintained during the base year threefold. While at the time the IFB was canceled the increased number of units would have been covered by warranty for approximately 4 months of the base year period had an award been made instead at that time, 8 months of that period would not have been covered by warranty, and in any event, the warranty did not cover all the maintenance that would be necessary. For the entire 3-year period, the number of units requiring maintenance was almost doubled. While the indefinite quantity maintenance apparently took into account the fact that gradual small increases in the number of units could occur during a yearly period, it did not take into account the large increase that occurred here and the consequently greatly increased costs. In sum, we conclude that these substantially increased requirements were clearly significant and the determination by NWS to cancel the IFB was reasonable.

As for Bangar's belief that NWS should have known prior to bid opening that construction of the new units had been completed and should have taken appropriate action prior to bid opening, the agency reports that the problem was only discovered during a preaward review and that this major omission was inadvertently overlooked. Information relating to whether there is sufficient reason to cancel a solicitation can be considered no matter when the information justifying the cancellation first surfaced. Independent Gas Product Corp., B-229487, supra. Since NWS had a compelling reason for canceling the IFB and since Bangar has submitted no evidence that racial prejudice or prejudice against small disadvantaged businesses played any role in the cancellation, we uphold the decision to cancel.

Finally, regarding the costs Bangar incurred because of statements allegedly made to it by NWS personnel, there is no evidence that any statement by NWS personnel could reasonably be construed as an inducement for Bangar to incur these costs before a contract was finalized. Bangar took these actions on its own initiative. Thus, Bangar's own voluntary actions cannot serve to prevent NWS from canceling the IFB where appropriate. See Sevcik-Thomas Building and Eng'rs Corp., B-215678, July 30, 1984, 84-2 CPD ¶ 128.

The protest is denied.

 James F. Hinchman
General Counsel